# No. 79-1423

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,
*Appellant,*

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
*Appellee.*

On Appeal from the Court of Appeal,
Second Appellate District,
State of California

## AMICUS BRIEF OF THE STATE OF TENNESSEE IN SUPPORT OF THE STATE OF CALIFORNIA

WILLIAM M. LEECH, JR.
(Lead Counsel)
Attorney General & Reporter for the
State of Tennessee
450 James Robertson Pkwy.
Nashville, Tennessee 37219
(615) 741-6474

JIMMY G. CREECY
Deputy Attorney General

KATE EYLER
Asst. Attorney General

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

## TABLE OF CONTENTS


| | Page |
|---|---|
| Preliminary Statement | 1 |
| Interest of Amicus Curiae | 1 |
| Summary of Argument | 2 |
| Argument: | |
| I. Reciprocal and Retaliatory Insurance Laws | 4 |
| A. Background and General Purpose | 4 |
| B. The Operation of Tennessee's Statute | 6 |
| II. The McCarran-Ferguson Act | 8 |
| III. The Commerce Clause | 9 |
| IV. Equal Protection | 12 |
| V. Effect of Ruling of Unconstitutionality | 14 |
| Conclusion | 15 |
| Appendix: | |
| Appendix A - Tenn. Code Ann. §56-4-218 | A-1 |
| Appendix B - Chapter 185, Tennessee Public Acts of 1957 | A-3 |


## TABLE OF AUTHORITIES

**Cases:**


| | |
|---|---|
| Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959) | 12 |

Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 527 (1935) ..... 10

Brown - Forman Co. v. Kentucky, 217 U.S. 563, 573 (1910) ..... 12

City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) 12,13

Fleming v. Fleming, 264 U.S. 29 (1924)..... 14

Freeman v. Hewit, 329 U.S. 249, 251-52 (1946) ..... 9

Gelpcke v. DuBuque, 1 Wall. 175, 17 L.Ed. 520 (1863) . 14

Great A & P Tea Co. v. Cottrell, 424 U.S. 366, 371 (1976) ..... 10

Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) ..... 14

Hughes v. Oklahoma, 441 U.S. 322, 326 (1979)..... 10

Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356 (1973) ..... 12

Lewis v. B. T. Investment Managers, Inc., 48 L.W. 4638, 4653 (1980)..... 9

Linkletter v. Walker, 381 U.S. 618 (1965)..... 14

Lyons v. Westinghouse Electric Corp., 235 F. Supp. 526 (S.D.N.Y. 1964) ..... 14

McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330-31 (1944) ..... 9

Paul v. Virginia, 75 U.S. 168 (1869)..... 4,8

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1956) ..... 9

Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) ... 10

Pike v. Brick Church, Inc., 397 U.S. 137 (1970) ..... 11

Prudential v. Benjamin, 328 U.S. 408 (1946) ....2,8,9,13,14,15

Prudential v. Hobbs, 328 U.S. 822 (1946)..... 13

Republic Ins. Co. v. Commissioner of Taxation, 272 Minn. 325, 138 N.W. 2d 776, 779 (1965) ..... 4

Shumaker v. Cincinnati, 68 Ohio St. 603, 68 N.E. 1 (1903) ..... 14

State of Board of Insurance v. Todd Shipping Co., 370 U.S. 451, 455-56 (1962)..... 9

United States *ex rel.* Angelet v. Fay, 333 F.2d 12 (2nd Cir. 1964), affirmed 381 U.S. 654 (1965) ..... 14

United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944) ..... 4,8

Williams v. Thomas Jefferson Ins. Co., 215 Tenn. 356, 365, 385 S.W.2d 908, 911 (1965) ..... 5,6,7

Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) 12

**Statutes and Rule:**

Tenn. Code Ann. § 56-4-218 .....4,5,6,7,10,11

Tenn. Code Ann. § 56-4-210..... 7

Chapter 185, Tennessee Public Acts of 1957 ..... 5

Supreme Court Rule 36.4 ..... 1

15 U.S.C. §§ 1011-1015 .....4,8,9,13

**Other Authorities:**

Pelletier, Insurance Retaliatory Laws, 39 Notre Dame Law 243 (1964)..... 4

# No. 79-1423

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,
*Appellant,*

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
*Appellee.*

On Appeal from the Court of Appeal,
Second Appellate District,
State of California

## AMICUS BRIEF OF THE STATE OF TENNESSEE IN SUPPORT OF THE STATE OF CALIFORNIA

### PRELIMINARY STATEMENT

Pursuant to Rule 36.4 of the Rules of this Court, the Attorney General of the State of Tennessee, on behalf of the Tennessee Department of Insurance, files this amicus curiae brief in support of the Appellee, the State Board of Equalization of the State of California.

### INTEREST OF AMICUS CURIAE

The State of Tennessee has a comparative retaliatory tax statute similar in function to the law of California being

challenged in this action. The State wishes to assert the constitutionality of its statute and of comparative retaliatory tax statutes in general. This brief is devoted solely to the retaliatory tax issue in this case.

## SUMMARY OF ARGUMENT

The comparative retaliatory insurance laws of the many states can withstand intense constitutional scrutiny and should be upheld. The opportunity to reaffirm and strengthen *Prudential* v. *Benjamin,* 328 U.S. 408 (1946), should be seized.

The passage of the McCarran-Ferguson Act was an explicit statement by Congress of its intent to exercise indirectly its plenary powers over commerce by bestowing upon the states the capability to place limitations on interstate commerce where normally the states could not interfere. State regulation and taxation of the insurance industry thrived prior to the passage of the Act; the existing state systems, and those to be developed, were recognized by and validated by Congress' action. *Prudential* v. *Benjamin* has long stood for this proposition. This combination of concurrent federal and state action is a potent expression of our governmental system and is in harmony with the grant to Congress of plenary powers over commerce.

Even had Congress not spoken, there would exist no Commerce Clause obstacle to the state comparative retaliatory insurance laws. These statutes are not inimical to the concept of free trade among the states. Obviously, they affect interstate commerce; equally obvious, they do not construct insuperable barriers to the participation of foreign insurors in the individual states' economies. Tennessee may be used as an example. Tennessee has far more foreign insurors doing business in the state than domestic companies, and the volume of business done by these insurors far exceeds retaliatory assessments paid. The burden placed on interstate commerce by assessments under the comparative retaliatory statute is minimal; the benefits derived from doing business in Tennessee are substantial.

The Equal Protection Clause also does not bar these state statutes. That the states have a legitimate interest in the regulation and taxation of the insurance industry has long been acknowledged. To equalize tax burdens and thus create a competitive atmosphere for their insurance companies, states have chosen to accord certain foreign insurors different treatment under comparative retaliatory insurance statutes. The method of classification used by the statutes is narrowly drawn to affect only those foreign insurors whose states of origin impose excessive barriers to the entry into their marketplace of the other states' insurors. The statutes thus do not constitute an invidious discrimination against insurors based solely on the fact that they come from outside the taxing state. The classifications work toward an equalization of tax burdens, foster competition, and allow reciprocal treatment where appropriate. The constitutionality of these statutes should be affirmed.

## ARGUMENT

### I.

### Reciprocal And Retaliatory Insurance Laws

### A. Background and General Purpose

Tennessee's reciprocal insurance tax law originally enacted in 1945, is found at Tenn. Code Ann. §56-4-218. See Appendix, at (p. A-1), for full text. It is basically similar to statutes found in almost all jurisdictions. *See* Pelletier, *Insurance Retaliatory Laws,* 39 Notre Dame Law 243 (1964), for a general overview and survey of this subject. This form of legislation has been in existence for over a hundred years and represents the efforts of the individual states to regulate the insurance business. In 1869, the United States Supreme Court held that insurance was not interstate commerce under the Commerce Clause and was, therefore, subject to state regulation. *Paul* v. *Virginia,* 75 U.S. 168 (1869). In view of a decision which departed from this principle, *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533 (1944), Congress in 1945 enacted the McCarran-Ferguson Act, 15 U.S.C. §§1011-1015, which sanctioned the scheme of state supervision of the insurance industry which had grown over the years and approved state regulation and taxation including by extension the state retaliatory tax schemes theretofore existing.

The scope and character of the state regulations and taxes varies somewhat from state to state because each state's plan evolved separately, but generally provisions were enacted as regulatory measures to protect insurance companies doing business in other states. The statutes were not originally designed to produce revenue, although this result may arise in a state having few domestic insurance companies. Pelletier, *Insurance Retaliatory Laws,* 39 Notre Dame Law 243 (1964). The general legislative purpose of retaliatory insurance laws and the way they function is well stated in *Republic Ins. Co.* v. *Commis-*

*sioner of Taxation,* 272 Minn. 325, 138 N.W. 2d 776, 779 (1965):

> It may be said generally that states have enacted these laws to protect insurance companies doing business in other states. The theory of the state is that foreign insurance companies should be subject to the same burdens as domestic insurance companies doing business in any foreign state. These statutes are primarily regulatory, the taxing feature being regarded as incidental. In some instances, statutes of various states so complement each other as to achieve an equalization on the basis of reciprocity. But in the absence of such an accommodation, the application of the retaliatory sanctions results.

When the Tennessee legislature reenacted its retaliatory insurance law in 1957, it stated these purposes in the preamble to the Act. See Appendix, at (p. A-3 ), for the preamble to Chapter 185, Public Acts of 1957. The legislative purpose and the express language of Tenn. Code Ann. §56-4-218 require the imposition of the retaliatory tax when the foreign jurisdiction comparatively discriminates against Tennessee insurors doing business in that jurisdiction. The Tennessee Supreme Court, construing the statutory provision, observed in *Williams* v. *Thomas Jefferson Ins. Co.,* 215 Tenn. 356, 365, 385 S.W. 2d 908, 911 (1965):

> As said above, the retaliatory or reciprocity provision, §[56-4-218], is a mandatory requirement that the same amount of tax be levied by the Commissioner upon a Kentucky insurance company doing business in Tennessee as Kentucky would levy upon a Tennessee company doing business in Kentucky.
>
> * * *
>
> By the retaliatory statute, the company is required to pay what other states require to be paid and, thus, brings in more revenue to this State.

The Court also stated:

> We feel that the conclusion above reached by the Chancellor is and was the intention of the Legislature, that is, that a foreign insurance company doing business in this state should pay the same amount of tax as would be levied upon a Tennessee company doing business in such foreign state. 215 Tenn. at 365, 385 S.W. 2d at 912.

**B. The Operation of Tennessee's Statute**

Tenn. Code Ann. §56-4-218 provides for a tax to be paid by certain out-of-state insurance companies and is based on the theory of reciprocity. The assessment of a tax based under this statute is triggered only when taxes and other burdens imposed by other jurisdictions on Tennessee insurance companies are in excess of such taxes and burdens imposed by Tennessee upon insurance companies from that same jurisidiction. Where these circumstances exist, the commissioner of insurance is authorized to tax the foreign insuror doing business in Tennessee at the same premium tax rate, or using the same restrictions or prohibitions, as that used in the state of origin of the foreign insuror against Tennessee businesses.

The commissioner computes the burden of tax or similar assessments on an aggregate statewide basis. To determine whether another state would impose an excessive tax burden on a Tennessee company doing business in that state, the commissioner computes the burden of premium taxes on the basis of the basic premium tax rate levied by the other state. This computation is made without reduction in the basic premium tax rate for either investments a like Tennessee company might qualify for in that state or as a result of investments such company may have made in Tennessee securities. The foreign insuror is not allowed to claim a reduction in the rate computed by the commissioner on the basis of the foreign state's statute. If this computation reveals that the state of origin of the foreign insuror doing business in Tennessee imposes a burden on Ten-

nessee companies doing business there which exceeds the tax burden Tennessee would place on foreign insuror, then a retaliatory tax is assessed.

The reciprocity of treatment yields, then, a retaliatory tax on foreign companies doing business in Tennessee based on the taxing, or other restrictive, treatment that the foreign company's domiciliary state accords Tennessee companies doing business in that state. The object of the statute is to reach a general equalization of burdens between Tennessee companies doing business out-of-state with any company from that state which is participating in Tennessee's marketplace. *Williams* v. *Thomas Jefferson Insurance Co.*, 215 Tenn. 356, 385 S.W. 2d 908 (1965). The statute insures that a "foreign insurance company doing business in this State [pays] the same amount of tax as would be levied upon a Tennessee company doing business in such foreign state." *Williams,* 215 Tenn. at 365, 385 S.W. 2d at 912. If the tax burden or other restrictions borne by the Tennessee company doing business in a foreign jurisdiction are not greater than those borne by a company from that jurisdiction doing business in Tennessee, no additional tax is authorized. As discussed in *Williams* v. *Thomas Jefferson Insurance Co.*, 215 Tenn. 356, 385 S.W. 2d 908 (1965), Tennessee does have a statutory provision which, basically, provides for a reduction or credit against its gross premiums tax for investments in Tennessee securities. *See* Tenn. Code Ann. §56-4-210. These statutory sections are to be read in harmony together, and the foreign insuror may take advantage of the credit provision after the commissioner has made his computations pursuant to Tenn. Code Ann. §56-4-218. *See Williams,* 215 Tenn. at 365, 385 S.W. 2d at 910-11.

## II.

### The McCarran-Ferguson Act

The McCarran-Ferguson Act, 15 U.S.C. §§1011-1015, does authorize the state statutes, such as the California statute under scrutiny here, which levy a comparative retaliatory tax on the premiums of certain insurance companies.

The McCarran-Ferguson Act was passed in the wake of *United States* v. *South-Eastern Underwriters Association,* 322 U.S. 533 (1944), in which this Court overruled the long-held concept that the insurance business was a purely local matter. Prior to *South-Eastern Underwriters* a substantial body of state regulatory and taxing law had developed regarding the insurance industry, based on the premise that insurance was not interstate commerce. *Cf. Paul* v. *Virginia,* 75 U.S. (8 Wall.) 168 (1869). Coming soon after the decision in *South-Eastern Underwriters,* the McCarran-Ferguson Act confirmed the states' powers over the insurance industry, giving congressional backing to existing and future state law on the subject by stating:

> Sec. 2.(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business. 15 U.S.C. §1012.

At the time of the passage of the Act, the Congress was acquainted with the extensive and disparate nature of the states' regulation and taxation of the insurance industry. *See Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, 430 (1946). Although much is made of the fact that Congress intended to give the states "no more powers than they previously had," it may be inferred from the remarks of Congressional members that the extensive nature of the already existing state power was being recognized and that the Congress anticipated only that matters such as contracts of insurance and re-insurance entered into outside a state's jurisdiction would be outside the state's

authority to regulate and tax. *See State Board of Insurance* v. *Todd Shipping Co.,* 370 U.S. 451, 455-56 (1962).

Thus Congress, pursuant to its plenary powers over commerce, has affirmatively and emphatically designated the states as the general regulatory and taxing authority in the field of insurance. This congressional action brought together the concurrent powers of both governments, state and federal, the strongest expression of regulatory and taxing power possible under our system of government. *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, 435-36 (1946); *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 59 U.S. 421 (1956). By enacting the McCarran-Ferguson Act, Congress has exercised its power to remove Commerce Clause restrictions on state regulation and taxation of insurance companies; it has carved out an area in which state statutory law may operate free from the restraints which Congress might impose pursuant to its plenary powers over commerce. *See Lewis* v. *B.T. Investment Managers, Inc.,* 48 L.W. 4638, 4653 (1980).

III.

**The Commerce Clause**

Even if the relevant state statutes are scrutinized independently of federal legislation, they will be found constitutional; they are not inimical to the free trade concept underlying the Commerce Clause. These state statutes do affect interstate commerce, but they do not burden it to such an extent nor in such a manner that they must fall in the face of the constitutional attack.

It is universally observed that the purpose of the Commerce Clause was to create free trade among the states, trade uninhibited by excessive interference by the states. *Freeman* v. *Hewit,* 329 U.S. 249, 251-52 (1946); *McLeod* v. *J.E. Dilworth Co.,* 322 U.S. 327, 330-31 (1944). The Commerce Clause is a positive grant to Congress of plenary powers over interstate commerce; it is also a restriction on the states against erecting

barriers against that commerce. *See, e.g., Hughes* v. *Oklahoma,* 441 U.S. 322, 326 (1979); *Philadelphia* v. *New Jersey,* 437 U.S. 617, 623 (1978). Where Congress has not spoken, however, the states may legislate to protect legitimate local interests even though interstate commerce may be affected. *See, e.g., Great A&P Tea Co.* v. *Cottrell,* 424 U.S. 366, 371 (1976). Different treatment of units of interstate commerce must be based, however, on some criterion other than solely a foreign origin to survive a challenge under the Commerce Clause. *Philadelphia* v. *New Jersey,* 437 U.S., at 626-27. The goal of the states must be ultimately to avoid regulation affecting interstate commerce which is in essence merely a form of economic protectionism. *Philadelphia* v. *New Jersey,* 437 U.S., at 624. States may not isolate themselves economically; to do so is to take action which is obviously inimical to the concept of free trade. *See Baldwin* v. *G.A.F. Seeling, Inc.,* 294 U.S. 511, 527 (1935).

The reciprocal or retaliatory insurance laws of the various states have a protective cast. Their burden on interstate commerce, however, is comparatively minimal, and the statutes do not build a wall around a state's economy which is impenetrable to interstate commerce. These points are illustrated by an examination of the effect of Tennessee's statute.

Tennessee's statute may serve as a basic example of a comparative retaliatory insurance law. First, it is reciprocal. Foreign insurors whose state of domicile does not exact taxes or other burdens in excess of Tennessee's comparable taxes and restrictions are benefited by the Tennessee statute; they may participate in Tennessee's marketplace without paying any assessment under Tenn. Code Ann. §56-4-218; these foreign insurors are thus classed with domestic insurors and experience no increased tax or like burden. Of the 962 foreign insurors doing business in Tennessee, 666 did not have to make any payment

pursuant to Tenn. Code Ann. §56-4-218.[1] Tennessee's statute becomes retaliatory in nature only when the foreign insuror's state of origin taxes, or otherwise restricts, Tennessee insurors doing business in that state in excess of taxes assessed by Tennessee on an insuror doing business in Tennessee. Of 962 foreign insurors doing business in Tennessee, 296 fall into the latter category. That the assessment thus imposed upon the latter group is not discriminatory in that it inhibits or prohibits foreign insurors from entering Tennesseee's marketplace is a simple matter of dollars and cents. Foreign insurors did $2,258,499,939 worth of business in Tennessee in 1978. In that same year they paid out $1,496,429[2] under the comparative retaliatory insurance law. Regulation by the comparative retaliatory insurance statute thus does not, on balance, impose a burden which is clearly excessive in relation to the benefits of doing business in Tennessee's marketplace. *See Pike* v. *Brick Church, Inc.*, 397 U.S. 137 (1970). An insuperable barrier to out-of-state insurors is not raised by Tennessee's statute. To the contrary, foreign insurors compete vigorously with domestic insurors in Tennessee. The retaliatory insurance statute, although it serves to protect the state's domestic insuror when the latter chooses to do business in another state, is not inimical to the Commerce Clause because it does not inhibit the flow of insurance business across state lines. The tax assessed is specifically related to a protective function, but, in the end, it generally equalizes burdens as between insurors of two different states and does not prohibit their growth and entrance into new marketplaces.

---

[1]These statistics are available through the Department of Insurance, State of Tennessee, and are from the calendar year 1978. The number of foreign insurors doing business in Tennessee increased in 1979 to 987, of which 367 were assessed a retaliatory tax.

[2]The amount of retaliatory tax collected in 1979 was $2,246,347. In contrast, it should be noted that the total amount of premium taxes collected in 1978 was $55,243,192, and in 1979, $59,769,742.

## IV.

### Equal Protection

Tennessee's comparative retaliatory insurance law does not single out foreign insurors for different treatment solely on the basis of their state of origin. The classes created by the statute do have a rational basis; the classifications are reasonably related to the legitimate state concern of regulating the business of insurance in the public interest.

An analysis of the Equal Protection challenge must begin with a review of what classifications are created by the statute. "Statutes create classifications which do not deny equal protection, it is only 'invidious discrimination' which offends the Constitution." *Lehnhausen* v. *Lake Shore Auto Parts,* 410 U.S. 356 (1973); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955). "If the ...classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of equal protection of the law." *Brown-Forman Co.* v. *Kentucky,* 217 U.S. 563, 573 (1910). A statutory discrimination will not be set aside if any stated facts reasonably may be conceived to justify it. *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 528 (1959). Where a state regulates in the economic field, the classification its legislation creates must be wholly irrational to fail under the Equal Protection Clause. The decisions of this Court presume the constitutionality of statutory discriminations in the economic field and "require only that the classification challenged be rationally related to a legitimate state interest." *City of New Orleans* v. *Dukes,* 427 U.S. 297, 303 (1976). *See also Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356 (1973).

The classifications created by the Tennessee statute may be delineated as follows:

(1) (a) Domestic insurors

(b) foreign insurors whose state of origin imposes no greater burdens, tax or otherwise, on Tennessee insurors than Tennessee would impose on the foreign insurors, and

(2) foreign insurors whose state of origin imposes a greater burden, tax or otherwise, on Tennessee insurors than Tennessee imposes on foreign insurors.

On the latter class falls the retaliatory assessment. Foreign insurors are not assessed the retaliatory tax simply because they come from outside Tennessee. The second factor defining the class is equally crucial and is the factor which triggers the assessment. The regulatory thrust of the Tennessee statute thus operates to tax only a specific group of foreign insurors.

The state has a legitimate interest in regulating the insurance industry; as this Court and Congress have both recognized. *See Prudential* v. *Hobbs,* 328 U.S. 822 (1946); *Prudential* v. *Benjamin,* 328 U.S. 408 (1946); 15 U.S.C. §1011 ("Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest...."). The rationale underlying the retaliatory insurance statute is that as between two states the insurance companies of each state doing business outside their own state of origin should carry equal burdens and thus compete equally from the same base. The states achieve such an objective through regulation of activity in their local economies. *See City of New Orleans* v. *Dukes,* 427 U.S. 297 (1976). Although a state has no right to isolate itself economically, it can, in the public interest, design legislation to create a more competitive atmosphere by equalizing the burdens among other competitors. The statutory classifications thus are not arbitrary; they are drawn as narrowly as possible to achieve equal restrictions on Tennessee insurors doing business in other states and foreign insurors coming into Tennessee to do business.

V.

**Effect Of Ruling Of Unconstitutionality**

A declaration by this Court that state comparative retaliatory insurance statutes are unconstitutional would have a devastating effect. The states would no longer have a regulatory tool with which to insure that their domestic insurance companies could compete in foreign markets, and the states would lose an established source of revenue. A decision to overrule *Prudential* v. *Benjamin* and declare the statutes unconstitutional should be applied prospectively only.

The traditional rule has been that an overruling decision operates retroactively. *See Fleming* v. *Fleming,* 264 U.S. 29 (1924). This rule is not without significant exemptions, however, and has not always been followed. *See, e.g., United States ex rel. Angelet* v. *Fay,* 333 F. 2d 12 (2nd Cir. 1964), *affirmed* 381 U.S. 654 (1965). This Court does have the power to make a ruling apply prospectively only; there is no federal constitutional impediment to the prospective application of a constitutional ruling. *See Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358 (1932). Where this Court has found special circumstances which warrant the denial of retroactive application, it has made the ruling prospective. *See Linkletter* v. *Walker,* 381 U.S. 618 (1965).

One such special circumstance is a showing that there has been justifiable reliance on the decision to be overruled and that those who have relied may be substantially harmed by the retroactive application of the decision. *See Gelpcke* v. *DuBuque,* 1 Wall. 175, 17 L. Ed. 520 (1863); *Lyons* v. *Westinghouse Electric Corp.,* 235 F. Supp. 526 (S.D.N.Y. 1964); *Shumaker* v. *Cincinnati,* 68 Ohio St. 603, 68 N.E. 1 (1903). Also, where a retroactive ruling might greatly burden the administration of justice, prospective application has been ordered. *Linkletter* v. *Walker,* 381 U.S. 618 (1965).

These special circumstances do exist here and warrant a prospective application of a decision of unconstitutionality. *Prudential* v. *Benjamin,* 328 U.S. 408 (1946), was a reassurance to the states that they could regulate in the field of insurance and could exact the type of tax here disputed. Millions of dollars have been collected by state governments and disbursed for public uses in reliance on *Prudential's* acknowledgement that state systems of taxation and regulation in the insurance industry were valid. A retroactive application of a decision of unconstitutionality would gravely hamper state government, both financially and administratively. Such a ruling would cast serious doubt upon the validity of many earlier judgments, and the very real potential for relitigation of many cases would severely encumber the administration of justice. Should the Court decide that retaliatory tax statutes are unconstitutional, the Court must apply the ruling prospectively to avoid the significant and overwhelming difficulties a retrospective application would spawn.

## CONCLUSION

For all the foregoing reasons, the State of Tennessee submits that the judgment of the Court of Appeal in favor of the validity of the comparative retaliatory tax statute of California should be affirmed.

Respectfully submitted,

William M. Leech
Attorney General

Jimmy G. Creecy
Deputy Attorney General

Kate Eyler
Asst. Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
(615) 741-6474

# APPENDIX

## APPENDIX A

TENN. CODE ANN. § 56-4-218 reads as follows:

When by the laws of any other state or foreign country any premium or income or other taxes, or any fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions or restrictions are imposed upon Tennessee insurance companies doing business in such other state or foreign country, or upon their agents therein, which are in excess of such taxes, fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions or restrictions imposed upon such insurance companies of such other state or foreign country doing business in Tennessee, or that might seek to do business in Tennessee, or upon their agents herein, so long as such laws continue in force the same premium or income or other taxes, or fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions and restrictions of whatever kind shall be imposed upon such companies of such other state or foreign country doing business in Tennessee, or upon their agents herein. The commissioner of insurance shall compute the burden of premium taxes on the basis of the basic premium tax rate levied by the laws of such other state or foreign country for the kind of business transacted without reduction in the basic premium tax rate for investments that a like Tennessee company may qualify for or as a result of investments such company may have made in Tennessee securities. Any tax, license or other obligation imposed by any city, county or other political subdivision of a state or foreign country on such Tennessee insurance companies shall be deemed to be imposed by such state or foreign country within the meaning of this section, and the commissioner of insurance for the purpose of this section shall compute the burden of any such tax, license or other obligation on an aggregate statewide or foreign country-wide basis as an addition to the rate of tax and to the charges that are or would be payable by similar Tennessee insurance companies in such state or foreign country. The provisions of this section shall be

applied on a retaliatory basis without consideration of any reciprocity an insurance company domiciled in another state or foreign country may claim due to lower premium or income or other taxes, or lower fees, fines, penalties, licenses, deposit requirements or other obligations, prohibitions or restrictions that are imposed upon such insurance companies of other states or foreign countries doing business in Tennessee. Each foreign insurance company doing business in Tennessee shall furnish, over the signature and oath of its responsible officers, the necessary information for the computation of such taxes upon such forms as may be prescribed by the commissioner of insurance. The commissioner of insurance may issue any and all necessary regulations to carry out the purposes of this section. The provisions of this section shall not apply to ad valorem taxes on real or personal property or to personal income taxes.

The time and period of payment of the retaliatory tax shall be the same in all cases as that of the gross premium tax provided for in § 56-4-205, and no interest charges or credits shall be made or allowed for use or loss of use of funds due to any conflict of the time or period of payment in this state and such time or period in a foreign state or country.

## APPENDIX B

The Preamble to Chapter 185, Tennessee Public Acts of 1957, reads as follows:

Whereas, Certain states impose higher taxes upon Tennessee insurance companies doing business in those states than Tennessee imposes upon insurance companies from those states doing business in Tennessee; and

Whereas, Thirty-eight states have enacted reciprocity laws in order to protect their insurance companies doing business in other states, and approximately half the states, recognizing the wisdom of encouraging domestic enterprise, now tax domestic insurance companies on a more favorable basis than that applied to foreign insurance companies; and

Whereas, By Chapter 3, Public Acts of 1945 (Section 56-408 of Tennessee Code Annotated), the General Assembly of Tennessee imposed a two percent (2%) gross premiums tax on all insurance companies, both domestic and foreign. Prior to 1945, domestic companies were exempt from such tax, but since that time domestic companies have been taxed on exactly the same basis as foreign companies; and

Whereas, It is fair and proper than an insurance company domesticated in another state and doing business in Tennessee should pay the same taxes in Tennessee that a Tennessee company would be required to pay in such other state; and

Whereas, By Chapter 49, Public Acts of 1953 (Section 56-423 of Tennessee Code Annotated), the General Assembly adopted a reciprocity law and granted tax relief for the protection of domestic insurance companies other than life and accident and health insurance companies; and

Whereas, By extending the provisions of Section 56-423 of Tennessee Code Annotated to life and accident and health insurance companies and thereby requiring such insurance companies domesticated in other states and doing business in Tennessee to pay the same taxes in Tennessee as Tennessee companies would be required to pay in such other states, tax relief can be extended to domestic life and accident and health insurance companies and yet a substantial overall increase can be produced in state revenues.